82-1254

Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

October Term 1982

No. _____

LILLIAN R. LEWIS,

Petitioner,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a determination that a successful applicant is better qualified than the minority plaintiff in an employment discrimination case can be determinative as a matter of law on the question of discrimination, where the district court has found as a fact that the employer's articulated explanation of superior qualification is pretextual.

2. Whether a Court of Appeals, in applying the clearly erroneous rule, of Rule 52, F.R.Civ.P., in reversing a finding of discrimination, must discuss in what way the subsidiary facts supporting a finding of discrimination are clearly erroneous.

3. Whether, the clearly erroneous rule of Rule 52, F.R.Civ.P., precludes the Court of Appeals from making factual

determinations of credibility, motivation and inferences, and requires that the case must instead be remanded to the district court for further findings.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 689 F.2d 1207 (4th Cir. 1982) and appears in the Appendix to this Petition, at A-30. The opinion of the district court is not officially reported. It appears in the Appendix at A-1.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on October 4, 1982. A petition for rehearing was denied on October 28, 1982. This petition for certiorari is filed within 90 days of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1981:

All persons within the jurisdiction

of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This is an action brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that petitioner Lillian R. Lewis, plaintiff below, was denied in September 1975 a position as accounting lab instructor at respondent Central Piedmont Community College be-

cause of racial discrimination. The district court had jurisdiction under 28 U.S.C. § 1343(a)(4).

The district court, after a non-jury trial, found that the respondent's articulated explanation for selecting Emily Roberts, the white applicant who received the job, was pretextual and that petitioner, who is black, was better qualified for the position than Roberts. A-11-12. The district court awarded plaintiff relief in the form of back pay and an injunction against discrimination in the future.[1/]

Petitioner graduated from college

1/ Because petitioner was promoted in 1978 to a position that paid more than the accounting laboratory position, she did not seek an injunction awarding her to that position.

with a bachelor's degree in economics in 1964. She was employed by the respondent in 1966 in its business office and has continued in that employment since. During this period, petitioner performed a wide range of accounting-related functions, even though she was not an accountant. A-3-5.

In September 1975, respondent advertised in an internal, employee newsletter the availability of the lab position in the Accounting Department. The only job qualifications specified, were "an associate degree in accounting or work experience equivalent." The position involved working with basic level accounting students, who completed problems assigned by classroom instructors. The lab instructor did not grade the problems. The lab instructor supervised and assisted the

students in the lab and worked with the audio-visual equipment. Lab work was not required for students beyond the basic courses, and students enrolled in courses beyond the basic courses rarely used the accounting lab. A-6.

Petitioner was interviewed by Herb Burns, chairman of the Accounting Department. During the interview, Burns discussed with petitioner the number of years since she had taken academic accounting courses. Burns was satisfied that petitioner's taking additional courses if she were selected would sufficiently refresh her academic qualifications. A-7.

Burns recommended petitioner for the position. His recommendation was ordinarily tantamount to selection. No other person interviewed the applicants.

Nonetheless, Burns' recommendation was subsequently overruled by some as-yet unidentified person in the respondent's hierarchy. The respondent has never articulated any explanation why or by whom the recommendation was overruled or withdrawn. A-8.

Following the withdrawal of the recommendation of petitioner, Burns recommended Roberts for the position. Roberts had only graduated from high school one year earlier in 1974 and had since graduating from high school been enrolled in respondent's accounting program. She was to graduate with an associate degree in accounting in October 1975, but did not have the minimum qualifications in the form of a degree when she was selected. She had had no practical work experience in dealing with any accounting principles.

A-8-9.

Burns denied at trial any recollection of making any recommendation prior to recommending Roberts, but a memorandum that he prepared in 1975 referred to an earlier recommendation and stated that he had not considered Roberts for the position at that time because he was under the impression that she could not be considered. Respondent asserted at trial, by way of argument of counsel, that this impression arose out of a misapprehension that a policy against nepotism precluded her from being considered. However, Burns testified that he did not believe that the nepotism policy ever precluded

Roberts from being considered.[2/]

Following Roberts' selection, respondent's personnel officer questioned the selection procedure. A Dr. Travis, who was Burns' superior, prepared a memorandum giving three reasons for choosing Roberts over petitioner. When the personnel officer indicated that two of the three reasons were "not accepted," Travis accommodated by providing a second memorandum which omitted the offending reasons and con-

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2/ The decision of the Court of Appeals erroneously states that Burns testified that the nepotism rule was the reason that he did not consider Roberts. A-40. There is simply no evidence to support that finding, and the district court made findings to the contrary, when it found tha the respondent had not explained the withdrawal of the initial recommendation.

formed to the personnel officer's expectations as to what constituted an acceptable reason. A-10-11.

Respondent's personnel policy gave incumbent employees such as petitioner a preference over non-employees in filling job vacancies. Although Roberts had worked for respondent as a typist, it was only in connection with a student work-study program, which did not qualify her as an employee entitled to the preference. A-10.

The district court found as a fact that petitioner was better qualified than Roberts because of petitioner's practical work experience, which the accounting lab was intended to provide, and because of Roberts' lack of such experience. This finding was based in part on respondent's having defined the

qualifications for the position alternatively, either in terms of academic qualifications or equivalent work experience. A-9-10.

Respondent asserted at trial that Roberts had been selected because of superior academic qualifications. The district court found that this articulated reason was pretextual and that petitioner had satisfied the burden of disproving respondent's articulated reason as the reason for the selection. The district court relied on a number of subsidiary facts in arriving at this conclusion, including: (1) respondent's having selected other lab instructors based on factors other than academic qualifications and having allowed lab instructors to update academic skills after being placed on the job; (2) Travis' willingness to modify his

explanation for selecting Roberts, in order to conform to the expectations of the respondent's personnel officer; (3) the respondent's having initially recommended petitioner for the position and never explaining the withdrawal of the recommendation; (4) respondent's having defined the job qualifications either in terms of experience or academic background. A-23-24. The articulated explanation having been proved not to be the true reason for respondent's action, the district court held that petitioner was entitled to judgment, under Texas Department of Community Affairs v Burdine, 450 U.S. 248 (1981).

The facts, as found by the district court and recited above were not disturbed by the Court of Appeals, and

the Court of Appeals made no contention that they were clearly erroneous. Instead, the Court of Appeals, focusing on the applicants' academic qualifications,[3] held that the finding of fact that petitioner was better qualified than Roberts was clearly erroneous, and made its own finding that Roberts was better qualified.

In so holding, it did not discuss the evidence which supported the finding of fact that petitioner's long years of practical experience overrode Roberts' academic qualifications, as well as the

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[3] The Court of Appeals also referred to petitioner's testimony in her deposition which it says demonstrates that she did not understand double-entry accounting. A-44. There was no evidence that the respondent ever considered any such evidence when the decision was made or even that any such inquiry had been made at that time.

uncontradicted evidence that respondent itself would consider work experience as equivalent to a two-year academic degree.[4/]

The Court of Appeals then further held that its determination that petitioner was not the best qualified dispelled any inference of discrimination and that the ultimate finding that the decision was illegally motivated was likewise clearly erroneous. The Court of Appeals therefore ordered that judgment be entered for respondent.

4/ At the time Roberts was selected for the position, she had not even received her associate degree and hence did not meet the respondent's stated minimum qualifications.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to clarify the role of the federal courts and the scope of the inquiry in reviewing employment decisions where there is a claim that a decision was discriminatory. In holding that the employer was entitled to judgment solely because of the finding of fact that the white applicant was better qualified, the Court of Appeals ignored the real factual issue of whether the decision was the product of illegal discrimination, regardless of who was better qualified. The Court failed to acknowledge the possibility that, regardless of qualifications, some other factor was the true reason for the decision. The decisions conflicts with Texas Department of Community Affairs v. Burdine, supra, and with decisions of

other Courts of Appeals which have correctly recognized that, while qualifications must be considered in making the ultimate factual determination, they are not necessarily dispositive.

Because of the large number of employment discrimination cases which now confront the federal courts, this case presents overriding issues in defining how the lower courts should resolve the ultimate factual issue of whether there was an illegal discriminatory motive. The Court should grant the writ to refine the holding in Burdine that discrimination can be proven by showing that an employer did not act for the reason that it claims. Granting the writ will allow the Court to clarify the role that the question of

qualifications plays in making the ultimate factual determination of discrimination and to resolve the conflict among the circuits as to whether qualifications alone can furnish the basis for resolving issue of discrimination.

The Court should also grant the writ because the Court of Appeals has exceeded the scope of its appellate review by appropriating to itself fact-finding functions which are reserved to the district courts, in conflict with Pullman-Standard v. Swint, ___ U.S. ___, 50 L.W. 4425 (1982).

This case presents important questions relating to the roles of the district courts and the Courts of Appeals in resolving disputed factual issues. In order to allocate properly these functions under Rule 52, and in

order to refine and clarify the holding in Swint, this Court should review the manner in which the Court of Appeals found the district court's findings of fact to be clearly erroneous.

The Court of Appeals has made findings of fact based on its independent review of the evidence, rather than limiting its review to an examination of the specific factual findings by the district court. It also failed to remand to the district court for determining ultimate issues of fact and instead made its own determination of ultimate factual issues.

I.
THE DECISION BELOW CONFLICTS WITH TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE AND WITH DECISIONS OF OTHER COURTS OF APPEALS IN MAKING QUALIFICATIONS DETERMINATIVE OF DISCRIMINATION

After finding that Roberts was

better qualified than petitioner, the Court of Appeals went on to resolve the ultimate factual issue of discriminatory motive solely on the basis of the applicants' qualifications. It concluded that superior qualifications alone could resolve the factual question of whether respondent's decision was motivated by discrimination.

The Court should grant certiorari to resolve the conflict between this decision and decisions of the Courts of Appeals for the District of Columbia and the Second Circuits. These two courts have held, consistently with Burdine, that qualifications are obviously one factor in resolving the factual issue, but they are not necessarily the dispositive issue.

In St. Peter v. Secretary of the

Army, 659 F.2d 1133 (D.C.Cir. 1981), cert. den. 50 L.W. 3765 (1982), the Court of Appeals affirmed the district court's finding that the plaintiff possessed qualifications superior to those of the male who was ultimately selected, but it also affirmed the finding that, notwithstanding her superior qualifications, the failure to select the plaintiff was for reasons other than illegal sex discrimination.[5/]

The Court in St. Peter recognized that, no matter how bizarre such a

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5/ St Peter was brought under § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, rather than under 42 U.S.C. § 1981. Nonetheless, the order of proof in cases decided by this Court under Title VII are equally applicable to claims of disparate treatment under § 1981. See General Building Contractors Ass'n v. Pennsylvania, ____ U.S. ____, 50 L.W. 4975 (1982)

situation might appear in terms of rational personnel practices, where the employer's practices result in selection of the less qualified applicant, superior qualifications did not necessarily resolve the issue of illegal discrimination. In his concurring opinion, Judge Mikva stated:

> Employers usually act in their own best interest, and it is somewhat incongruous to find that the employer chose a less-qualified man, rather than a more-qualified woman, but did not do so for discriminatory reasons. Although it may be difficult to convince a trier of fact that an employer selected a less qualified person for a non-discriminatory reason, such behavior is not actionable.

659 F.2d at 1139.

The Second Circuit adopted the same standard in Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980):

> Title VII does not require that the candidate whom a court consider most qualified for a particular position be awarded that position; it

> requires only that the decision among candidates not be discriminatory. When a decision to hire, promote or grant tenure to one person than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn.

The decision here reaches the opposite conclusion, and finds that proof of superior qualifications dissipates any inference of discrimination and holds as a matter of law that no discrimination existed, regardless of the employer's true motive.

St. Peter and Lieberman correctly apply Burdine, which recognizes that the appropriate inquiry in an employment discrimination case is directed at the employer's motive and not to which applicant is better qualified. While qualifications is obviously an important factor in making such a determination,

it is not necessarily dispositive. The district court must resolve a factual dispute. Simply stated, it must determine whether the employer's articulated explanation of superior qualification is the true explanation. If the respondent acted for some reason other than its articulated reason, the applicants' qualifications are meaningless, and petitioner is, under Burdine, entitled to judgment, regardless of the absolute qualifications of the applicants. See Burdine:

> The fact that a court may think that an employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

This case presents important questions in the administration of the

federal employment discrimination statutes, including Title VII as well as § 1981. It raises questions about scope of review allowed by Burdine and, furnishes authority for the federal courts to determine, not the question of discriminatory motive, but of relative qualifications.

II.
THE DECISION CONFLICTS WITH PULLMAN-STANDARD V. SWINT

Rule 52, F.R.Civ.P., reserves to the district court, in non-jury cases, the fact-finding function and allows the Court of Appeals to reverse those findings only where they are clearly erroneous. This case presents important questions about the administration of that rule and about the allocation of the fact-finding function between the district courts and the Courts of Appeals which should be resolved by this

Court.

Pullman-Standard v. Swint prescribed guidelines for invoking the clearly erroneous rule in determining issues of intent and motivation in employment discrimination cases. The Court of Appeals made no reference to Swint, and there is no attempt in the opinion to comply with its directives.

The Court should grant the writ to determine the extent to which the Court of Appeals must examine the subsidiary findings of fact which underlie the ultimate findings of the district court found to be clearly erroneous.

Swint requires the Court of Appeals to focus on the evidentiary basis for the particular finding of the district court which is said to be clearly erroneous, and directs the Court of Appeals not to substitute its own

independent judgment of the facts. The decision below, instead of examining the evidentiary basis for the district court's findings, focuses solely on the applicants' academic qualifications. It minimizes petitioner's work experience, which the district court, relying on respondent's own definition of qualifications, relied upon in finding that petitioner was better qualified than Roberts. The Court of Appeals did not identify or discuss any evidentiary basis for holding that the district court's finding that petitioner's qualifications, defined in terms of work experience, were superior to Roberts' academic qualifications. Nor did it point to any of the numerous subsidiary findings of fact which supported the finding that petitioner was better

qualified.

The Court should grant the writ to determine whether this summary treatment of the district court's detailed findings of fact complies with Rule 52 and with Swint.

The decision further conflicts with Swint by appropriating to itself an issue of fact which Swint explicitly reserves to the district court, i.e., the ultimate issue of intent. The question presented under both Title VII and § 1981 is one of the employer's intent and not of qualifications. In determining as a matter of law that there was no discrimination, based on a comparison of the applicants' qualifications, the Court of Appeals has made a finding of fact which properly belongs to the district court.

Swint directs that, where the

district court's decision is premised on clearly erroneous facts the Court of Appeals should remand the case for further factual findings. The district court should in the first instance be allowed to make findings as to whether qualifications furnished the true motive for the action, regardless of which applicant was better qualified in some absolute sense.

The Court of Appeals has appropriated to itself the fact-finding function, a function reserved to the district court, which has the opportunity to hear the evidence first-hand and to make findings of facts based on its observation and ability to make credibility resolutions.

As discussed above, qualifications are not necessarily ultimately

dispositive of the question of whether there has been illegal discrimination. A finding that Roberts was better qualified does not necessarily resolve the question of whether that petitioner was a victim of racial discrimination, particularly under the facts of this case. Indeed, the fact that petitioner was initially selected for the position. She was entitled to a preference over Roberts as a result of her status as an incumbent employee. These factors must be considered in determining whether the respondent's articulated explanation was pretextual. Swint requires a remand to the district court to make additional findings of fact.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-78-202

LILLIAN R. LEWIS, Plaintiff,	)	
vs.	)	Filed November 30, 1981
CENTRAL PIEDMONT COMMUNITY COLLEGE, Defendant.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action was tried by the court without a jury[1] on August 26 and 27,

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[1] The defendant's answer asked for a jury trial. The case was, however, placed on the non-jury roster and was calendared for trial several times on the non-jury calendar. Several days prior to trial, defendant's counsel called to the court's attention the fact that defendant has requested a jury trial. The plaintiff sought only equitable relief, and there is therefore no entitlement to a jury trial. The fact that plaintiff sought monetary relief in the form of back pay does not transform

the claim into a legal claim. Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971), cert. dism, 404 U.S. 1006 (1971); Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 (4th Cir. 1966); Burt v. Board of Trustees of Edgefield County School District, 521 F.2d 1201, 1205 (4th Cir. 1975).

1981. The court heard final arguments on September 23, 1981. Based on all the testimony, the exhibits and the arguments of counsel, the court makes the following findings and conclusions, in compliance with Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

1. Plaintiff Lillian Lewis is black. She graduated from Johnson C. Smith University in 1964 with a bachelor's degree in economics. She was employed by defendant Central Piedmont Community College in 1966. She has been continually employed by the college since that time.

2. During plaintiff's tenure with the college, she has worked in the Business Office. When she first began work there, the Business Office was small. Its size and range of functions

have expanded considerably, as has the college itself, during the years since 1966.

3. Plaintiff was classified as cashier or head cashier from 1966 until she was promoted in December 1978 to DICER Accounting Specialist. (DICER is an acronym for Direct Index of Cost Efficiency Reporting.) As the Business Office expanded, plaintiff's responsibilities and duties likewise expanded. Although plaintiff was not working as an accountant during those years, her duties included a wide range of accounting-related functions, such as posting receipts and adjustments to accounts receivable ledger cards, balancing accounts receivable ledger cards, preparing daily cash analysis summary sheets, writing adjustment sheets for bad checks to be used for

general ledger journal entries and auditing and controlling state receipt books. They did not include reconciling or closing general ledgers.

4. During the years that plaintiff had worked in the Business Office, the defendant had several times brought in white employees with less qualifications than plaintiff to act as her supervisor. These positions were never advertised, and plaintiff did not know about them until after they were filled. In 1968 a white person was brought in as head cashier. When that person left in 1970, another white person was brought in as Cash Receipts Administrator. Plaintiff had to train both of these white employees.

5. On September 2, 1975, plaintiff applied for a position at the college as

accounting lab instructor. The position involved working with basic accounting students, as they completed problem sets assigned by their classroom instructors. The evidence did not establish that the lab instructor either wrote or graded these problem sets. He or she was expected only to supervise and assist students in the lab, rather than to teach, or to work the problems for them. Lab work was not required for students enrolled in courses other than basic courses, and students enrolled in courses other than basic courses rarely used the lab. When advanced students did use it, it was more often for the purpose of locating reference materials than for purposes of working accounting problems.

6. Plaintiff was interviewed for the position by Herb Burns, who was

chairman of the Accounting Department. During the interview, Burns asked plaintiff if she would be willing to take some refresher courses in accounting, since she had not taken any such courses since graduating from college in 1964, and her job at Central Piedmont had not given her the opportunity to apply her full educational background in accounting on a daily basis. Plaintiff agreed to do this, and Burns was satisfied that this would be satisfactory. Burns did not at any point suggest that plaintiff's academic qualifications would be a hindrance to her getting the job.

7. Burns recommended plaintiff for the position over a number of other applicants, including the white applicant who was eventually placed in

the position. This recommendation was made in a written memorandum from Burns to his supervisors; the memorandum has disappeared; the college has offered no explanation for its disappearance. Before plaintiff was officially notified, Burns' recommendation of plaintiff was for some reason either withdrawn or overruled. The college has never offered any explanation of why the department head's recommendation was overruled. Ordinarily, hiring recommendations of department heads were routinely approved without review.

8. After selection of plaintiff was apparently vetoed, Burns recommended another applicant, Emily Roberts. Roberts, who is white, was at that time a full-time student in the college's associate's degree program. She had graduated from high school just fifteen

months earlier. Roberts had no practical work experience in the area of accounting. She had, during her enrollment at the college, worked part time as a clerk-typist and had substituted as the "night" lab instructor in the accounting lab on occasion. At the time that she applied in August 1975 she had not yet completed the college's associate's degree program. She received her associate's degree in September, 1975.

9. The college's personnel policy at that time gave a preference to incumbent employees of the college in that they were given the first opportunity to apply for job openings. Vacancies were advertised first in The Communicator, an internal house newspaper which is distributed to full

time college employees. By first advertising internally, the college could promote from within, if there was a qualified applicant within the college. Plaintiff, as a long-standing full-time employee, was entitled to this preference. Roberts' status as a student typist did not qualify her for the preference for promoting present college employees.

10. When Roberts was chosen over plaintiff, a question was raised about why Roberts was selected. The college's personnel officer required Burns' supervisor to explain the selection. The supervisor, Dr. Travis, wrote a memorandum giving three reasons for selecting Roberts over plaintiff. The personnel director rejected two of the three reasons as not being appropriate reasons on which to base a personnel

selection. Travis then re-wrote the memorandum and omitted the offending explanation, in order to conform to the personnel director's expectations.

11. This procedure, of requiring a justification of the personnel selection, was an unusual practice, and was not customarily followed in filling a vacancy.

12. Plaintiff was fully qualified for the position of accounting lab instructor, and in fact was better qualified than Roberts to work with students in the accounting lab, because of her extensive experience using accounting principles in a practical work setting. Unlike Roberts, she was qualified to assist and counsel students who planned to use their education in the business world. The evidence showed

that plaintiff over a period of a number of years before 1975 had been a mainstay in the operation of the Business Office, that she had demonstrated a great deal of ability to work with the college's financial books and records, and that she had the ability to work in a sophisticated accounting job (DICER) when finally given the opportunity. She had consistently done a good job for the college and accepted the growing responsibilities of the Business Office which accompanied the growth of the college itself.

13. The defendant sought to justify the selection of Roberts on the sole basis of her academic record. There is no evidence which would support a finding that academic background was the only qualification relevant to the job. 'On the contrary, Burns' initial

recommendation of plaintiff, with the understanding that she take refresher courses following her selection, demonstrates that academic qualifications were not the controlling factor in determining who was best qualified. In addition, there was evidence that the college had previously hired lab instructors in other departments who did not have the full academic training of college. Lab courses are designed to allow students to learn the practical aspects of their particular discipline, and plaintiff's years of experience with the college would appear to make her best qualified for this position.

14. The subsequent effort, in the form of the Travis memoranda, to justify the selection of Roberts is pretextual,

and the court does not credit it. Travis failed to mention or explain the initial recommendation of plaintiff, and rewrote his original justification memorandum to satisfy the personnel officer. Further, the memoranda were prepared after the fact, for the purpose of justifying a questioned personnel selection, and their credibility is for this additional reason suspect. Indeed, the very fact that plaintiff was initially recommended over Roberts is itself evidence that the memoranda's justifications are pretext, and Lewis was originally determined to be the best qualified candidate for the accounting lab position.

15. In October 1976 plaintiff applied for a position as Senior Accountant in the defendant's Business Office.

16. Robert Hoelzel, who was and is the college's Controller, and who was at that time in charge of the Business Office, became aware in August 1976 that the person in the position would be leaving because of his inability to perform the job.

17. College procedures required that the vacancy be advertised in The Communicator prior to its being advertised in any media outside the college. Hoelzel had been informed of this policy by the personnel office, and should have been aware of it during the process of filling this vacancy. Hoelzel was also informed that college policy required that any media advertising be placed by the personnel office, and not by the department where the vacancy occurred.

18. Notwithstanding his knowledge of the college policy, Hoelzel advertised the position in the Charlotte Observer, a daily newspaper of general circulation. The ads ran on September 17, 18 and 19, 1976. These advertisements were placed directly by Hoelzel, without consulting or notifying the personnel office. He also interviewed the applicants and hired Kathern Davis, a white applicant, for the position, without notifying or consulting the personnel office, in violation of college policy.

19. Hoelzel eventually notified the personnel office of the vacancy, and it was advertised in The Communicator on Friday, October 1, 1976. Plaintiff applied for the position the following Monday, October 4, 1976. On that same day, Ms. Davis reported for her first

day on the job. Ms. Lewis was, of course, never considered for the position, because it had already been awarded to Davis.

20. When plaintiff learned that the position had been filled, she questioned Betty Funderburke, the personnel officer, about this. Funderburke called it to the attention of the president of the college. Only after he was directed to do so by the president did Hoelzel speak with the plaintiff about it. He apologized to her, but he gave her no reason, either then or at trial, to explain his deviation from known policies of the college, except to say that he had made a mistake.

21. There was never a comparison of plaintiff's qualifications with the

successful white applicant, since the position had already been filled when plaintiff submitted her application. Under the college's policy, plaintiff and Davis would not necessarily have been compared, since the college's policy provided that a promotion could be given to a qualified incumbent, before applicants from outside the college were solicited. However, the court finds that Davis' qualifications were superior to plaintiff's and that there was no discrimination in the filling of this vacancy. 2/

22. In December 1978 plaintiff applied for and was selected for the

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2/ It is worth noting that Hoelzel was looking for an applicant with experience in fund accounting and with computer experience and that Davis had neither. Davis had studied both subjects, but had never worked in the accounting field. Her 26 quarter hours of accounting translated into slightly more than 17 semester hours. Plaintiff had 12 semester hours of accounting courses.

DICER Accounting Specialist position. In that position, she has performed a number of specialized and sophisticated accounting duties. Her performance in that position demonstrates that she could have handled the professional demands of both positions she had earlier been denied.

23. The difference between plaintiff's earnings and those of Emily Roberts were, for the years shown:

1975	$144.00
1976	690.00
1977	816.00
1978	708.00

28. Since plaintiff received the DICER job in December 1978, her salary has been greater than that of the lab instructor position. Consequently, her entitled to back payment terminates at

that point.

CONCLUSIONS OF LAW

The applicable standards to be applied in Title VII cases were set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 49 L.W. 4214 (1981). The claim relating to the accounting lab is brought under 42 U.S.C. § 1981 rather than Title VII. Although the Fourth Circuit has left open the question whether proof of racial motivation is required under 42 U.S.C. § 1981, United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 848 (4th Cir. 1979), claims of disparate treatment have long required some showing of intent when brought under Title VII. See International Brotherhood Of Teamsters v. United States, et al., 431 U.S. 324, 335 n.15 (1976). The

sequence of proof in a Title VII claim remains applicable to claims of employment discrimination brought under § 1981. See Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Ingram v. Madison Square Garden Center, Inc. 482 F.Supp. 918, 924 (S.D. N.Y. 1979). See also Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 475 (4th Cir. 1978), cert. den., 440 U.S. 979.

Under McDonnell Douglas and Burdine, plaintiff must first establish a prima facie case of discrimination. She can do this by showing: (1) that she is a member of a racial minority; (2) that the defendant was seeking applicants for a vacancy; (3) that she was qualified for the position; and (4) that she applied for the job and was not accepted. The court holds that

plaintiff met her initial burden of establishing a prima facie case with respect to both the accounting lab and the senior accounting positions.

Under Burdine, plaintiff is entitled to judgment a a matter of law if the defendant then fails to articulate a legitimate non-discriminatory explanation of its action.

> If the trier of fact believes the plaintiff's evidence [establishing a prima facie case], and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 49 L.W. at 4216. If the defendant articulates such a legitimate, non-discriminatory explanation for its action, the plaintiff then has the opportunity to persuade the court that the articulated reason is pretextual.

Defendant attempted to explain the withdrawal of the initial recommendation of Ms. Lewis and the selection of Ms. Roberts, a white applicant, for the lab instructor position on the basis of Ms. Roberts' alleged superior qualifications. The court has weighed the evidence, and concludes that this explanation is pretextual. Among the factor which the court has considered in making this determination are plaintiff's superior qualifications for the position, when her non-academic as well as academic background is considered; the defendant's past history of denying plaintiff promotions by awarding them to less qualified whites; the fact that the explanation tendered by the college was prepared only after the fact, in response to a request to explain the selection; the fact that

Travis was willing to tailor his response to whatever the personnel officer felt was appropriate; the fact that plaintiff had been previously recommended as the best qualified applicant; and the fact that no reason has ever been advanced as to why the initial recommendation did not stand. The court further finds in the evidence taken as a whole -- the unexplained withdrawal of the initial recommendation of plaintiff for the job, and the post hoc explanations for the substitution of an inexperienced white applicant -- a strong suggestion that racial motivation played a part in defendant's actions.

With respect to the senior accountant position, the defendant's only explanation for its failure to follow its own personnel policies was

that Hoelzel, for some unexplained reason, "goofed." The court does not consider this to be a "legitimate, non-discriminatory" explanation for its action. Nonetheless, the court holds that the successful white applicant was better qualified than was plaintiff, and that plaintiff did not carry her burden of proving that defendant's articulated reason for its final hiring decision was pretext. See Burdine, supra, 49 L.W. at 4217.

In order to make her whole for the denial of the accounting lab position, plaintiff is entitled to recover back pay. That amount is calculated as the difference between the amount she was able, with reasonable effort, to earn, and what she would have earned, had she been employed in the position. Inasmuch as plaintiff was subsequently promoted

to a more desirable position and seeks no promotion in connection with the accounting lab position, no further specific relief is required.

Plaintiff is also entitled to recover pre-judgment interest on the back pay award. Goodwin v. City of Pittsburgh, 480 F.Supp. 627, 635 (W.D. Pa. 1979), aff'd. 624 F.2d 1090 (3rd Cir. 1980); Vant Hul v. City of Dell Rapids, 465 F.Supp. 1231, 1233 (D.S.D. 1979); Howard v. Ward County, 418 F.Supp. 494, 506 (D.N.D. 1976); EEOC v. Local 2P, Lithographers and Photoengravers International Union, 412 F.Supp. 530, 543 (D. Md. 1976); Chastang v. Flynn & Emrich Co., 381 F.Supp. 1348, 1351-2 (D. Md. 1974), aff'd. 541 F.2d 1040 (4th Cir. 1976). The amount of back pay provided in the

judgment will include pre-judgment interest computed at the rate of eight per cent. N.C.G.S. § 24-1. Interest at eight per cent through October 31, 1981, is $970.00.

Plaintiff is the prevailing party in this litigation and is entitled to recover her attorney fees. 42 U.S.C. § 1988. As such, she is entitled to recover for "all time reasonably expended on a matter." S.Rep. 94-1011, 94th Cong., 2nd Session, at p. 6, expressing the Congressional intent as to the interpretation of 42 U.S.C. § 1988. In Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 636 (6th Cir. 1979), the Court said:

> This approach [of cutting compensable hours for issues not prevailed upon] is not proper under the Fees Awards Act (42 U.S.C. § 1988). The question as to whether

> the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues or research which was ultimately unproductive, rejected by the court or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole, the district courts are to allow compensation for hours expended in unsuccessful research or litigation, unless the positions are frivolous or in bad faith.

See also Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Calif. 1974), aff.d, 550 F.2d 464 (9th Cir. 1977); rev'd. on other grounds, 436 U.S. 547 (1978); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Skerkow v. State of Wisconsin, Department of Public Instruction, 630 F.2d 498, 504 (7th Cir. 1980). A separate order will be entered dealing with fees and costs.

This 25 day of November, 1981.

/s/ James B. McMillan
James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1079

Lillian R. Lewis,

Appellee,

v.

Central Piedmont Community College,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge

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Argued: July 21, 1982
Decided: October 4, 1982

Before RUSSELL, WIDENER and HALL, Circuit Judges.

William L. Auten (Blakeney, Alexander & Machen on brief) for Appellant; Louis L. Lesesne, Jr. (Gillespie & Lesesne; Jonathan Wallas, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A. on brief) for Appellee.

HALL, Circuit Judge:

Lillian R. Lewis filed this suit pursuant to the Civil Rights Act of 1886, 42 U.S.C. § 1981, and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f), alleging that the defendant, Central Piedmont Community College (the College), discriminated against her on the basis of race when it failed to promote or transfer her to several positions for which she applied. The district court, after a trial without a jury, found for the plaintiff with regard to one of the alleged incidents of discrimination and ordered the payment of $2,358.00 in back pay. Additionally, the court awarded plaintiff's counsel $9,964.64 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. From those orders, the defendant appeals. We reverse.

I.

Lillian Lewis, who is black, graduated from Johnson C. Smith University with a bachelor's degree in economics in 1964. Her curriculum there included two courses in accounting principles and two in intermediate accounting. Subsequent to her graduation, she worked as a key punch operator and, in 1966, began working as a cashier in the business office at the defendant College.

In September, 1975, Lewis applied for a position as an accounting lab instructor in the College's accounting department.1/ She was interviewed by

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1/ The accounting lab is a room equipped with materials and staffed with personnel to provide assistance to accounting majors. It is open for the use of all accounting students, but is primarily patronized by those in the basic level accounting courses. According to the head of the accounting department, "[t]he major function of the laboratory instructor is to

Herbert Burns, the head of the department, who at the time gave no indication that Lewis was not qualified for the job, but did ask whether she would audit several accounting courses as a refresher so that she would be able to handle the job. Although Burns was responsible for reviewing all applications and conducting interviews, the ultimate selection was to be made by his superiors.

Also interviewed for the position was Flora Roberts, a white student in the process of completing the College's two year accounting program. Roberts' records indicated that she had taken a number of courses particularly relevant

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(footnote 1, continued)

tutor students on a one-to-one basis in solving the problems given to them by their classroom instructors."

to the job of lab instructor. In addition to the basic courses in accounting principles and intermediate accounting, Roberts had studied advanced accounting, auditing, and income tax and cost accounting. She eventually was hired for the job.

Following Roberts' selection over Lewis and five other applicants, Lewis, who had heard from several school employees that she had been recommended for the job, contacted David Hunter, the director of personnel, to inquire as to why she had not been selected. She was informed that Roberts was hired because of her superior academic credentials.

In the fall of 1976, Lewis again sought a better position by applying for the job of Senior Accountant in the College's Business Department. Although the College maintained a written policy

to announce such openings in its employee newsletter first, the school's Controller inadvertently placed the initial advertisement in the local city newspaper. Consequently, by the time Lewis applied for the position, it had been filled.

Subsequently, Lewis filed this action seeking declaratory relief, injunctive relief and back pay for lost wages. The College answered denying discrimination and requesting a jury trial on all issues. The district court denied that request and, after a full non-jury trial, concluded that Lewis had not proven discrimination with respect to the 1976 Senior Accountant opening,[2]

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[2] Lewis has not appealed or cross-appealed to challenge this portion of the lower court's decision.

but that she had been discriminated against by not being hired for the accounting lab position.

On appeal, the College presents three issues for review: (1) whether the district court erred in its finding of racial discrimination; (2) whether the district court erred in refusing defendant's request for a jury trial; and (3) whether the court erred in the amount of attorney's fees awarded. As discussed below, our disposition on the first issue alleviates the need for extensive consideration of the remaining two issues.

II.

In McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory

treatment.3/ First, the plaintiff has the burden of establishing a prima facie case of discrimination. Then the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for rejecting the plaintiff. The burden of proving discrimination, however, remains with the plaintiff and, therefore, if the employer presents legitimate reasons for plaintiff's

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3/ Although McDonnell Douglas was a Title VII case and the trial court here treated Lewis' claim concerning the lab instructor position under 42 U.S.C. § 1981, it has been held, and we think correctly, that the McDonnell Douglas criteria apply equally to cases arising under Title VII or § 1981. Hudson v. Int'l Bus. Mach. Corp., 620 F.2d 351, 354 (2d Cir.), cert. denied 449 U.S. 1066 (1980); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 (7th Cir. 1977); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); and Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974). Cf. United States v. Chesterfield County School District, 484 F.2d 70, 73 (4th Cir. 1973).

rejection, it is the plaintiff's burden to prove that those reasons were actually a pretext for discrimination.

In order to establish a prima facie case, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for the available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In the case at bar, Lewis established that she wa a member of a racial minority and had applied for the position of accounting lab instructor. She presented evidence of her qualifications, which included her academic credentials discussed above, her experience in the College's business office and her ability to perform

certain accounting-related tasks in her present job as "DICER accounting specialist" 4/ at the school. Finally, she presented evidence which indicated that Herbert Burns had initially recommended her for the job, but later changed his recommendation to urge the selection of Flora Roberts. This last evidence took the form of testimony from other employees who claimed knowledge of Lewis being recommended and a memorandum from Burns to his superior recommmending Roberts which referred to a "previous recommendation."

The College countered, primarily through the testimony of Burns, who explained that Roberts was hired because of her stronger academic background.

4/ Lewis was promoted to her present position subsequent to the initiation of this suit.

Although he did not recall making a prior recommendation for the plaintiff, Burns did testify that he did not consider Roberts initially because her sister worked at the college and he had been told that she could not be considered due to the school's "anti-nepotism" policy. As it turned out, that rule had recently been abolished and, therefore, Roberts was eligible for the job.

After considering all of the evidence, the district court found, inter alia: that Lewis was better qualified than Roberts for the position of lab instructor; that Burns initially recommended Lewis for the position of lab instructor, which recommendation was subsequently withdrawn or overruled; that no explanation was given why the recommendation was overruled; and that

the College's justification that Roberts had a better academic record was pretextual. Accordingly, the court concluded that Lewis had met her burden of proving discrimination and was, thus, entitled to back pay for the period from 1975 until the time she was eventually promoted in 1978.

The critical question in this case is whether, in fact, Lewis was better qualified than Roberts for the position of accounting lab instructor. In our opinion, the finding of the lower court that she was is clearly erroneous and, therefore, we must reverse.

The record in this case indicates that Roberts was much better qualified for the accounting lab instructor job. She was in the process of completing the College's two year accounting program

and had received the highest attainable grade in six of her eight accounting courses. As already noted, her curriculum included four advanced accounting courses as well as supporting courses in mathematics, business and economics. Finally, although she did not have extensive practical experience, Roberts had already worked in the accounting lab on a part-time basis as the night lab instructor.

Lewis, on the other hand, had received a four year degree in economics, but had taken only four accounting courses and had no academic training since 1964. She had not studied any advanced accounting in college and overall her grades were poor. 5/ Additionally, during her

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5/ The record indicates that Lewis was on academic probation for poor scholarship during her last semester in college.

interview for the job, Herbert Burns indicated that it would probably be necessary for her to audit several courses as a refresher so that she "would be able to perform the job." 6/

Through direct examination, Lewis testified that in her present position she is exposed to a wide variety of accounting-related tasks. On cross-examination, however, she admitted that in her prior position as a cashier, the job she held when she sought the position of lab instructor, her duties included very little work involving journal entries and no work with the general ledger. Moreover, through a

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6/ Several years later, Lewis did, in fact, enroll in the College's basic accounting course as a refresher. On cross examination, she admitted that she opted for this course over a more advanced one because she had been out of school for such a long time.

series of questions posed at her deposition, the College established that Lewis did not even understand the basic concept of double-entry accounting. Consequently, although the plaintiff had some practical experience relevant to the position of lab instructor, it was hardly enough to overcome the deficiencies in her academic record. Therefore, in our opinion, the district court's finding that Lewis was better qualified for the position than Roberts is clearly erroneous.

Proof that the successful applicant was better qualified for the job is not, in and of itself, always sufficient to defeat a claim of racial discrimination. In this case, however, once the College established that Roberts was, in fact, far more qualified than Lewis, there simply was not enough other evidence to

support a finding of discriminatory intent. Indeed, the only other evidence which strongly implied possible discriminatory intent, the changed recommendation, loses its strength once it is determined that Roberts was better qualified. The trial court emphasized the fact tha apparently Burns initially recommended Lewis and then changed that recommendation to urge Robert's hiring. Burns explained, however, that although Roberts was the one he wanted for the job, there initially appeared to be a problem on the part of the college as to whether she was eligible to be hired. If Lewis had been better qualified, then this changed recommendation would certainly cast suspicion on the school's actual motive. However, since Roberts was clearly the best qualified, any

possible inference of discriminatory intent disappears.

In sum, the critical finding supporting the district court's determination of racial discrimination was that Lewis was better qualified than the successful applicant. Since we believe that the court erred in that finding of fact, we hold that the court also erred in concluding that the defendant's selection of Roberts was racially motivated. Accordingly, we reverse.

III.

As we reverse the lower court's decision on the merits of Lewis' discrimination claim, there is no need for us to reach defendant's contention that it was entitled to a jury trial in this case. Additionally, as a result of our disposition of the primary issue

before us, plaintiff can no longer be deemed the "prevailing party" in this action, see Bagby v. Beal, 606 F.2d 411, 415 (3rd Cir. 1979), and, thus, is not entitled to attorney's fees under 42 U.S.C. § 1988. Accordingly the district court's order requiring the College to reimburse Lewis $9,964.64 for attorney's fees and costs is also reversed.

IV.

For the foregoing reasons, that portion of the district court order finding for the plaintiff on the merits and awarding her back pay, and the accompanying order granting attorney's fees and costs are hereby reversed.

REVERSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1079

Lillian R. Lewis, Appellee,

versus

Central Piedmont Community College, Appellant.

O R D E R

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Widener.

For the Court,

/s/ William K. Slate, II

CLERK

FILED
October 28, 1982
U.S. Court of Appeals
Fourth Circuit

Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN R. LEWIS,

Petitioner,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR CENTRAL PIEDMONT COMMUNITY COLLEGE IN OPPOSITION TO PETITION

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I.

COUNTERSTATEMENT OF THE CASE

Lillian R. Lewis asserted that Central Piedmont Community College in 1975 had denied her a promotion to an Accounting Lab Instructor position because she is black, alleging that subject-matter jurisdiction was conferred by the Civil Rights Act of 1886, 42 U.S.C. §1981, and by 28 U.S.C. §1343(a)(4).

After a nonjury trial, the United States District Court for the Western District of North Carolina entered a Memorandum of Decision concluding -- without finding any facts -- ". . . that plaintiff did suffer discrimination in being denied the accounting lab position for which she applied in August 1975." Thereafter, in obedience to the District Court's Memorandum, Ms. Lewis'

counsel tendered proposed findings and conclusions and a proposed judgment. The College promptly filed specific exceptions to Lewis' proposed findings and conclusions, asserting that in numerous respects her proposals were inconsistent with, or flatly contradicted by, both admitted and uncontroverted facts. The District Court, having made barely noticeable revisions, entered findings and conclusions essentially identical to those Lewis' counsel had proposed. The College gave notice of appeal to the United States Court of Appeals for the Fourth Circuit.

On its appeal, the College argued that the trial court erroneously and improperly had adopted conclusionary proposed findings that were "unsupported by substantial evidence"; that were "flatly contradicted by [admissions] and uncontroverted testimony"; and that were "'clearly erroneous'". The

College asserted that there were no material evidentiary conflicts and that Lewis, as a matter of law, had met neither of her burdens of proving both that she was qualified for the Accounting Lab Instructor job and that the College's "articulated" reasons for its promotion decision were pretextual.

Upon its review of the entire record, the Circuit Court held, in most pertinent part:

> "The critical question in this case is whether, in fact, Lewis was better qualified than Roberts [a white female] for the position of accounting lab instructor. In our opinion, the finding of the lower court that she was is clearly erroneous and, therefore, we must reverse.
>
> . . .
>
> "Proof that the successful applicant was better qualified for the job is not, in and of itself, always sufficient to defeat a claim of racial discrimination. In this case, however, once the College established that Roberts was, in fact, far more qualified than Lewis, there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 41, 44-45) [Emphasis added].

Accordingly, the Court of Appeals "Reversed" the District Court's judgment and order. Lewis' petition for rehearing was denied, and no judge requested a poll on her suggestion for rehearing en banc (App. to Petition, pp. 48-49).

II.

SUMMARY OF ARGUMENT

As will be shown below, no significant legal issues were presented to or decided by the Circuit Court. The Court of Appeals' decision applies settled authority, clearly enounced by this Court, to a record that includes no material evidentiary conflicts. Upon the College's appeal, no credibility resolutions were necessary, and none were made.

The record did include unrebutted evidence presented by the College and a number of crucial admissions by Ms. Lewis, although the Petition resolutely ignores all such

evidence. Instead, the Petition's presentation of the "facts" incorporates only the unsupported, conclusionary "findings" that were and are the work of Lewis' counsel and decidedly are not a product of the District Court's "weighing and appraising" all of the evidence.

The District Court's uncritical adoption of an advocate's one-sided proposed findings -- that conveniently ignore damaging admissions and unrebutted adverse evidence -- has on other occasions been faulted by the Court of Appeals. The Circuit Court expressly has applied the familiar "clearly erroneous" review standard in this case, in circumstances where "more careful scrutiny" of adopted findings was absolutely justified.

Upon a record without material evidentiary conflicts and upon unsupported adopted findings, it cannot fairly be contended that

the Circuit Court's review of all the evidence and its reversal of the District Court in this case present any "significant question of federal law." No conflict with decisions of other courts can be said to exist in these circumstances. And there otherwise are no "special and important" reasons advising an exercise of this Court's discretion to review this case.

The Petition endeavors to create an illusion of significant legal issues by mischaracterizing and misrepresenting both the Court of Appeals' decision and the evidence that was reviewed on appeal.

Incredibly, a primary contention advanced by the Petition is that the Circuit Court has based its decision solely on an abstract perception of the relative qualifications offered by two candidates for promotion, without any regard to any possibility that the College acted with discriminatory

intent. Such contention borders on dishonesty because the Court of Appeals' opinion specifically recognizes and holds that proof of a successful applicant's superior qualifications ". . . is not, in and of itself, always sufficient to defeat a claim of racial discrimination" (App. to Petition, p. 44).

The Circuit Court opinion clearly reflects the Court's careful review of the entire record, including evidentiary details and, quite properly, including Lewis' admissions and unrebutted evidence presented by the College. This entirely appropriate review culminated in the following rulings: (1) The District Court's finding that Ms. Lewis possessed better qualifications was "clearly erroneous" (App. to Petition, p. 41); (2) Admissions and incontrovertible evidence established ". . . that [the successful applicant] was, in fact, far more qualified than Lewis . . ." (App. to

Petition, p. 44); and (3) Given the successful applicant's clearly superior qualifications, ". . . there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 44-45) [Emphasis added].

As will be shown in the Argument below, these rulings certainly were within the Circuit Court's jurisdiction and authority and are correct as a matter of law. Lewis' testimony and other incontrovertible evidence conclusively establish that nothing in her training or experience, or within her knowledge, qualified her to teach in the College's Accounting Lab. Lewis' testimony undeniably reflects her complete unfamiliarity with the most basic accounting terminology, principles and procedures applied and practiced even by first-year accounting students in the Lab. Finally, as the Court of Appeals ruled, there is absolutely no

evidentiary basis for any conclusion that the College's reasons for its decision were pretextual, disguising a discriminatory intent.

III.

ARGUMENT

A. The Court of Appeals Applied A Narrow Review Standard

In the Court of Appeals, the College challenged the most crucial of the District Court's adopted findings on the specific grounds that they were "clearly erroneous". The College also specifically argued that such adopted findings were "unsupported by substantial evidence" or were "flatly contradicted by [admissions] and uncontroverted testimony." The Circuit Court explicitly applied that familiar and strict standard of review.

As will be demonstrated in Section B. of this Argument, the Petition presents a

singularly misleading and sometimes absolutely false version of the facts -- a version having its origins in Lewis' one-sided proposed findings. The Circuit Court's opinion properly addresses the most pertinent parts of the entire evidence, and this Brief invites the Court's attention to other material, incontrovertible facts.

The Court of Appeals did not even approach the outer limits of its jurisdiction and authority, consistent with Rule 52(a) of the Federal Rules of Civil Procedure, to set aside clearly erroneous, conclusionary findings adopted by a District Court. Certainly the Circuit Court was not bound to disregard either Lewis' admissions or unrebutted evidence presented by the College.

The College's case on appeal specifically was premised on the commonplace that "if a finding is not supported by

substantial evidence it will be found to be clearly erroneous" (See Wright & Miller, Federal Practice and Procedure: Civil §2585, p. 735 (1971), and cases cited therein). This Court has held, in language pertinent to this case, that a finding may be "clearly erroneous" upon review of "the entire evidence", even if it might be said "there is evidence to support it". United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948) [Emphasis added].

Moreover, the Circuit Court explicitly and carefully has confined its review of this case to the well known standards specified by this Court with regard to "the order and allocation of proof" in an employment discrimination case (See App. to Petition, pp. 36-38). The Court of Appeals required only that the District Court's judgment be supported by evidence of any ". . . circumstances which give rise to an

inference of unlawful discrimination" (App. to Petition, p. 38). Upon review of the entire evidence, however, the Circuit Court properly ruled that ". . . once the College established that [the successful applicant] was, in fact, far more qualified than Lewis, there simply was not enough other evidence to support a finding of discriminatory intent" (App. to Petition, pp. 44-45) [Emphasis added]. Again, Lewis' admissions and other incontrovertible evidence compelled this ruling.

It is respectfully contended that this application of the "clearly erroneous" review standard does not suggest any ground or reason for review by this Court. As the College asserted on its appeal and now asserts, there are no material evidentiary conflicts in this case. On the College's appeal, no credibility resolutions were necessary, and none were made.

> "Under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact are conclusive unless clearly erroneous, but when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved."
>
> Mayo v. Pioneer Bank & Trust Co., 297 F. 2d 392, 395 (5th Cir. 1961)

Furthermore, the District Court in virtually all material respects adopted Lewis' proposed findings. On its appeal, the College submitted that the Court of Appeals should ". . . engage in a more careful analysis of [such] adopted findings than [it] would have had they been authored by the district judge." (See Hagans v. Andrus, 651 F. 2d 622, 626 (9th Cir. 1981).) Beginning in 1977, the Circuit Court has criticised the District Court's wholesale adoption of proposed findings, suggesting that ". . . the District Court prepare its own

opinion." (See White v. Carolina Paper Board Corp., 564 F. 2d 1073, 1082, 1083 (4th Cir. 1977); see also, Holsey v. Armour & Co., 683 F. 2d 864 (4th Cir. 1982).) As the Court of Appeals most recently and pertinently has held:

> "There can be no dispute that the District Court itself, in its 'Memorandum of Decision,' actually made no findings of fact or conclusions of law as those terms are used and construed in Rule 52(a), Fed.R.Civ.P.
>
> ...
>
> "We, along with other courts, have on a number of occasions - one as recently as a few months ago in Holsey v. Armour & Company, 683 F. 2d 864 (4th Cir. 1982) - expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-word in support of its previously announced decision. The reason for such disapproval is inherent in Rule 52(a), Fed.R.Civ.P., a fair compliance with which 'requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to "state separately" its conclusions thereon with clarity.' [Citations omitted.]
>
> ...

"All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944), to comment that the adoption of 'findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will '"feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge' [Citation omitted].

...

"The adoption by the district court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the '"clearly erroneous"' rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge.

...

"When the findings of fact and conclusions of law adopted by the District Court have been given that 'careful scrutiny' by the appellate court that is required under such circumstances and have been 'more narrowly' examined . . . , and when, the reviewing court, on the entire record, 'is left [after such review] with the definite and firm conviction that a mistake has been committed,' United

> States v. Gypsum Co., 333 U.S. 364, 395 (1948), or it is convinced that 'the result in a particular case does not reflect the truth and right of the case,' Armstrong Cork Co. v. World Carpets, Inc., 597 F. 2d 496, 501 (5th Cir. 1979), cert. denied, 444 U.S. 932, it is the duty of the appellate court to reverse the findings and conclusions as clearly erroneous."
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> Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, F. 2d (4th Cir. 1983), published Slip Opinion in No. 81-1536, pp. 9-10, 11, 13, 14, and 15-16[1]

B. Incontrovertible Evidence and Lewis' Admissions Precluded Any Inference of Intentional Discrimination Because of Race

The following summarization of incontrovertible evidence and of Lewis' admissions demonstrates that the Court of

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[1]The above-quoted case was decided by the same panel that decided this case now before this Court on Petition for Certiorari. Oral arguments in the two cases were presented on the same day, and both appellants urged that the Court of Appeals should "engage in a more careful analysis of ... adopted findings than [it] would have had they been authored by the district judge."

Appeals' decision is correct as a matter of law.

According to Lewis' admissions, the College's Accounting Lab was utilized by students in all its accounting courses, including Cost Accounting, Auditing, Income Taxation and Advanced Accounting. Most significantly, Lewis further admitted that the College's Accounting Department Head "explained" the Accounting Lab Instructor "job description" to her and specified that if the students "had questions about what was going on [the instructor] was to have been able to help them." Accordingly, Lewis also admitted that she understood "there was to be some instructor assistance where [the students] needed it." Upon Lewis' foregoing admissions, detailed testimony by College witnesses merely corroborated and amplified the facts that students in all the College's

accounting courses utilized the Lab and that the Lab Instructor taught and assisted them.

Six persons applied for the Accounting Lab Instructor position, two of whom already were employed by the College in other positions. A white female, Ms. Roberts, was completing her accounting studies at the College and was employed by the College as a parttime Accounting Lab Instructor when she applied for the fulltime position. Ms. Lewis, who at the time was employed as a cashier in the College's business office, also applied for the job.

The Petition asserts that a College ". . . policy gave [Lewis] a preference over non-employees in filling job vacancies" and that, in effect, Roberts was a "non-employee" because she had been employed as a typist ". . . in connection with a student work-study program, which did not qualify her as an employee entitled to the

preference" (Petition, p. 9). This contention ignores the fact that Roberts also was a parttime Accounting Lab Instructor. Furthermore, the District Court decidedly did not find or conclude that the College was required by its policy to hire Lewis as the Accounting Lab Instructor, even though the District Court did adopt the erroneous finding that Lewis was qualified for the job.

The College's Accounting Department Head testified without contradiction that the job required teaching accounting students a wide variety of accounting tasks ranging ". . . from very simple things like making journal entries in all journals, . . . using ledgers, general ledgers, subsidiary ledgers, special ledgers [and] preparation of financial statements." Even students in the College's "basic principles courses" had to "learn" and "know how" to prepare "journal entries or closing

entries", "to prepare financial statements" including "balance sheets and income statements", to "reconcile a ledger", to accomplish "the closing of a set of books" and to make "closing entries".

Lewis had completed only two basic and two intermediate accounting courses some eleven years prior to the promotion decision in question. Her general academic performance was poor; her class rank was 153 in a class of 170; and she was on "probation" for "poor scholarship" during her final semester. Lewis admitted that she had no other "training [n]or any experience in accounting." Specifically, Lewis never took courses in Cost Accounting, Auditing, Income Taxation or Advanced Accounting, and admitted that she would have been required to "assist" the College's accounting students who were taking these courses. Her only job experience was as a "key punch operator" for

another employer and as a "cashier" for the College.

Prior to her employment by the College, Lewis had never worked with a general ledger, had never made any journal entries and had never applied any of the basic accounting instruction she had received. As a cashier at the College, she had never worked with a general ledger, had never "balanced or reconciled general ledgers", had never made "journal entries", had never "posted general ledgers" and did not even know what "closing statements" were. In fact, she had never seen a complete set of accounting books.

Even after a 1979 promotion, Lewis did no general ledger work and made journal entries only when her supervisor gave her explicit instructions as to the accounts she should debit and credit. Lewis admitted that the College trained her to perform the

duties of the job into which she was promoted in 1979 and that such duties are not taught in any accounting course.

Aside from her admitted lack of on-the-job experience in applying even basic accounting terminology and procedures, Lewis' testimony demonstrated a shocking lack of knowledge concerning the most fundamental accounting principles. Lewis was unable to identify even broad, general categories of general ledger accounts, such as asset, liability, expense or income accounts. She could not describe a general ledger or a journal entry and did not know that journal entries are required in order to close a general ledger. The term "trial balance" had little meaning to Lewis. Her testimony revealed that she did not understand even the most elementary principles of double-entry accounting.

Because of Lewis' obviously limited background in and knowledge of accounting principles and procedures, Ms. Roberts was selected as the more qualified candidate for the Accounting Lab Instructor position. Roberts already had served as a parttime Accounting Lab Instructor and, as the Accounting Department Head testified:

> ". . . Roberts was selected because she had the best academic credentials. . . . She had just recently been through our program and been through the courses that were offered on [our] campus. She would be working with students who would be going through those same courses, and she had also been through courses at all levels in which students would be using the lab. . . . We were looking for a person who had the academic qualifications to work with those students, to be able to assist them in solving their accounting problems and completing their classroom assignments. . . ."

Roberts' transcript revealed that she had completed eight accounting courses; that she had made six "A's" and one "B" in the seven courses for which she received grades;

and that she had completed the Income Tax, Auditing, Advanced Accounting and Cost Accounting courses that Lewis had never taken.

The foregoing summarization of the facts presents only admitted and incontrovertible record evidence. The Petition, however, resolutely ignores Lewis' admissions and the incontrovertible evidence pertaining to the relative qualifications of the candidates for promotion. The Petition merely restates the unsupported and conclusionary adopted findings to the effect that Lewis' work experience qualified her for the position. The entire evidence, however, devastates any assertion that Lewis' work experience or accounting knowledge qualified her to teach accounting students anything that related to the courses they were taking. Such restated adopted findings hardly overcome the overwhelming evidence that

Lewis was not even minimally qualified for the Accounting Lab Instructor position.

The Petition also restates the adopted findings in an attempt to denigrate Roberts' obviously superior qualifications. It is indisputable that Roberts had excelled in all of the College's intermediate and advanced accounting courses and had completed with distinction all of the accounting lab problems that the College's students would be encountering in the Lab. She earned her Associate Degree in Accounting before she assumed the duties of the Lab position. By contrast, more than three years after the Accounting Lab opening, Lewis registered for, and subsequently completed, the College's first introductory accounting course because, as Lewis testified, "if I started there with the basic course and got the foundation . . . I could go from there."

Roberts also had experience in putting her accounting courses to the exact "practical application" required in the Lab -- she had completed all the problems assigned in the Lab and all the courses to which the Lab was an "adjunct", both with outstanding results. Furthermore, as the College's part-time Accounting Lab Instructor, she had directly applicable "work experience".

There was a single, immaterial evidentiary conflict in this case. Disputed evidence tended to show that the Accounting Department Head made an initial recommendation, never acted upon, that Lewis be selected for the Accounting Lab Instructor position. On appeal, however, it was totally unnecessary for the College to quarrel with the District Court's adopted findings upon this disputed evidence. This was because of the undisputed and incontrovertible testimony that the Department Head, who

allegedly made the recommendation, "was told" the College's "anti-nepotism" policy precluded the selection of Roberts, the preferred and more qualified candidate, because her sister was employed by the College.

Exactly contrary to representations set forth in the Petition, the Department Head testified without contradiction that he "was told [Roberts] could not be considered" because of the policy. Indeed, one of Lewis' own witnesses testified that "[i]f I recall correctly, he thought the [anti-]nepotism policy was still in effect and that [Roberts] could not be hired for that reason." Additionally, another of Lewis' own witnesses testified that at the time the Department Head allegedly wrote the recommendation, Roberts had not been considered for the job, and there had been no comparison of the applicants' qualifications.

There is absolutely no evidence that anyone ever considered Lewis to be even as qualified as Roberts. At trial, Lewis admitted that she did not even claim she was more qualified than Roberts. Lewis also admitted that the Department Head, who allegedly later made a recommendation of Lewis, had advised her during her interview for the position that ". . . the work [she] had been doing there on campus in the Business Office would have been different from [the] work that was to be done in the Accounting Lab." Even if the alleged recommendation of Lewis did occur, such recommendation could not establish that Lewis was as qualified as Roberts.

The entire evidence conclusively demonstrates that nothing in Lewis' training or experience, or within her knowledge, established her qualifications to teach in the Accounting Lab. The Circuit Court certainly

was not required to ignore Lewis' total unfamiliarity with and inexperience in the most basic accounting terminology, principles and procedures applied and practiced even by first-year accounting students in the Lab.

Conceding that the College had specified "an Associate Degree in Accounting or work experience equivalent" as minimal qualifications for the Lab Instructor position, the Petition argues that Lewis' work experience qualified her for the position and that the alleged recommendation proved her qualifications. Incontrovertible evidence indisputably establishes that Lewis had no experience with, and could not have given instruction or assistance in, even the most elementary accounting principles and procedures. Her own testimony devastates the assertion that she proved the qualifications element of her case.

Furthermore, incontrovertible record evidence clearly shows that the successful candidate for the promotion, Roberts, possessed the academic credentials and current, advanced knowledge of accounting principles and theories that the College reasonably concluded would enable her to instruct and assist accounting students taking all the College's accounting courses.

The Petition refers to testimony that three College employees, one of whom was black, had been placed in other jobs and had been permitted to complete the studies necessary to fulfill all the educational requirements for such jobs. There is, however, no evidence that fully qualified candidates had applied or were available for these other positions. Furthermore, Lewis admitted that she could not have completed twelve or more hours of accounting courses and have performed the Lab Instructor's duties.

The Petition misrepresents the incontrovertible evidence relative to the written recommendations that Roberts be selected for the position. The initial written recommendation made by the Department Head was as follows:

> "[Roberts] is a graduate of the Accounting Department at the College. Her grades are excellent and her former instructors highly recommend her. She is totally familiar with our instructional programs, and fully committed to our methods of instruction."

The Petition ignores this initial recommendation of Roberts as the superior candidate, which specified undeniably proper and nondiscriminatory reasons. Instead, the Petition seeks to focus attention only upon a subsequent "translation" of this initial recommendation. Part of the subsequent "translation" of the initial recommendation was considered improper by the College's Personnel Director, who subsequently

accepted the reasons set forth in the initial recommendation.

After Roberts had been selected for the position rather than Lewis, Lewis "asked for a hearing" with the Personnel Director regarding the reasons for Roberts' selection. Lewis' testimony establishes that the Personnel Director was satisfied a proper decision had been made. Lewis admittedly "believed" the Personnel Director's explanation that the selection had been based upon qualifications.

It is absolutely indisputable that the College did "articulate" nondiscriminatory reasons for its promotion decision. Upon the entire evidence, summarized above, the Court of Appeals properly reversed the District Court's unsupported conclusion that the College's articulated reasons were pretextual.

Lewis' own admissions conclusively establish that "her non-academic . . . background" (that is, her work experience) decidedly did not expose her to even the most basic accounting terminology, principles or procedures. There is absolutely no record evidence that white males hired by the College in 1968 and 1970 were "less qualified" than Lewis - this adopted conclusion was a naked assertion by Lewis' counsel. The Department Head's initial "explanation" for his recommendation of Roberts was not "prepared . . . after the fact" -- the Personnel Director merely requested clarification of a rather nebulous "translation" of the initial recommendation. The clarification given the Personnel Director set forth the reasons incorporated in the initial recommendation rather than tailoring its content "to whatever the personnel officer felt was appropriate." Even if the Department Head

did draft a recommendation of Lewis -- because he had been told Roberts could not be considered for the position -- there is absolutely no record evidence that anyone ever thought Lewis was "the best qualified applicant". The Department Head at all times considered Roberts to be the better-qualified candidate, and he selected her after it was determined that the College's "anti-nepotism" policy was not an obstacle. Upon this incontrovertible evidence, the Court of Appeals properly concluded there is absolutely no evidentiary basis for a conclusion that the College's reasons for its decision were pretextual, disguising a discriminatory intent.

IV.

CONCLUSION

Upon all of the foregoing, Central Piedmont Community College earnestly

contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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